TING TECK SIE

v.

WONG SEN CHIEW & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB SAID J
[SUIT NO: D4 (D8)-26-61-2000]
25 APRIL 2005

COMPANY LAW: *Members' rights - Oppression - Petition under s. 181(1)(a) & (b) of Companies Act 1965 - Financial irregularities and mismanagement - Allegation of - Whether proved - Whether there were sufficient grounds to show affairs of company exercised in manner oppressive to petitioner - Whether in total disregard of petitioner's interest as member or shareholder - Orders to be given by court under s. 181 petition - Appropriate remedy*

The petitioner filed this petition under s. 181(1)(a) and (b) of the Companies Act 1965. The facts were that the petitioner was a member of Autorn Sdn Bhd ('fifth respondent') and held 17.5% shares in the said company. The petitioner's investigations revealed that there was mismanagement in the fifth respondent and had confronted the first and second respondents, the principal directors running the company. A fracas ensued and subsequently on 20 April 1999 at the company's annual general meeting, the petitioner was removed from the board of directors. The petitioner, *inter alia*, prayed that the first and fourth respondents return monies that were wrongfully paid to them and misappropriated by them. The petitioner also prayed for accounts and inquiry and that the first to fourth respondents buy the petitioner's shares in the fifth respondent.

Held (order accordingly):

[1] On complaints relating to financial irregularities and mismanagement, the respondents had not done enough to refute the claims. The respondents had not provided delivery orders and receipts, thus had not disproved the allegation of false invoicing. In the absence of any credible denial, the court deduced that the financial improprieties did occur. These financial improprieties were a visible departure from the standards of fair dealing and a violation of the condition of fair play which a shareholder was entitled to accept. It amounted to oppression. (p 502 c-d)

[2] The respondents' failure to lodge statutory reports further aggravated the situation. The 1999 Annual General Meeting had tabled the statement for the year 1996 whilst 1997 and 1998 had not been prepared. This was clearly mismanagement of the financial affairs of the company. On the issue of dividends, the respondents explained that the dividends were not declared because of capitalization of profits towards the increase of share capital. This was said to be in view of the company's objective to be public listed. Surely the respondent's failure to lodge its annual returns since 1994 would put the purported objective in serious doubt. In any event, failure to declare dividends was an oppressive conduct and in total disregard of the interest of the petitioner. (p 502 e-h)

[3] On the allegation of unauthorised loans to directors, the respondents had not given a credible denial and merely said that the purported loans were repayment to directors for short term advances made to banks. However, no details of what those advances were, to which bank and for what purpose were given. As for the unauthorised transactions alleged by the petitioner, the respondents' excuse that the sum of RM750,000 was director's emolument was unacceptable. It did not refute the allegation that the above amount was set off against the purchase price of the company property to pay off the first respondent's personal loan. (p 503 a-b)

[4] There were sufficient grounds to show that the affairs of the company were exercised in a manner oppressive to the petitioner and in disregard of his interest as a member or shareholder. The orders to be given by the court under a s. 181 petition must best serve the interest of the member or shareholder *vis a vis* the company as it thinks fit. Here, where it was not possible for the parties to work together, the only practical option would be for the majority to buy out the minority as against the last resort of winding up. (p 503 d-e)

[First to fourth respondents required to purchase the petitioner's shares in 120 days from the date of appointed auditor Ernst & Young's confirmation by letter to the first to fifth respondents on the market value of shares.]

Case(s) referred to:

Chiew Sze Sun & Anor v. Cast Iron Products Sdn Bhd & Ors [1993] 2 AMR 44 ***(refd)***

In Re Carrington Cotton Corporation Ltd [2000] Q SC 61 ***(refd)***

Jaya Medical Consultants Sdn Bhd v. Island & Peninsular Bhd & Ors [1994] 1 MLJ 520 ***(refd)***

Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd [1994] 2 MLJ 789 ***(refd)***

Narayan v. Official Assignee, Rangoon AIR [1941] PC 93 ***(refd)***

Re Khong Thai Sawmill (Miri) Sdn Bhd v. Ling Beng Sung [1978] 2 MLJ 227 ***(refd)***

Re OC (Transport) Services Ltd [1980] BCLC 251 ***(refd)***

Re Saul D Harrison & Sons Plc [1995] 1 BCLC ***(refd)***

Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd [1996] 1 MLJ 687 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 181(1)(a), (b)

For the petitioner - S Selvi (Rohan Abdullah with him); M/s Gooi & Azura
For the respondents - WT Khoo; M/s Hariati & Khoo

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Said J:

The petitioner filed this petition under s. 181(1)(a) and (b) of the Companies Act. The petitioner complained that the respondents, by their actions, had oppressed the petitioner as a member of the fifth respondent (Autorn Sdn Bhd).

The first and second respondents are principal directors running the company. The first respondent is the Managing Director and the second respondent is the Finance Director. The first respondent was at that time involved in the equipment industry. In April 1990 the petitioner contributed an initial sum of RM110,000 as capital. He was made a Director in 1990 and was given the post of Project Manager.

The petitioner is the registered holder of 17.5% shares in the fifth respondent whilst the first to fourth respondents hold 72.3%. Apart from the petitioner, all members of the fifth respondent are siblings of the Wong family and/or their relatives. The petitioner had initially played an important role in the day to day running of the company and had made important decisions on personnel administration. Their relationship turned sour when the petitioner questioned the accuracy of the fifth respondent's financial statement, especially on the deliberate reduction in figures pertaining to the company's profits.

The petitioner's investigations revealed that companies in which the first to fourth respondents held stakes had issued many false invoices. This, the petitioner said was designed to enable wrongful payments to be made to them. The prices in the invoices had been raised, so that the respondents could reap profits. The respondents were said to have failed to declare dividends and failed to prepare their financial statements from the years 1997 to 1998. There were unauthorized loans issued to directors and repayment is made by way of unauthorized sale of the company property.

The petitioner confronted the first and second respondents. A fracas ensued. On 20 April 1999 at the Company's Annual General Meeting, the Wong family voted to remove the petitioner as directors.

The petitioner *inter alia* prays that the first to fourth respondents return monies that were wrongfully paid to them and misappropriated by them. The petitioner also prays for accounts and inquiry and that the first to fourth respondents buy the petitioner's shares in the fifth respondent.

The respondents had earlier raised the issue of *res judicata* by virtue of the dismissal of the s. 218 Winding Up petition that the petitioner filed in Kuala Lumpur High Court, Dagang 1. Parties were granted a number of postponements to enable them to settle the issue of the date for valuation of the petitioner's shares. Before the learned counsels read their submissions, the defendant's counsel agreed that he will not raise the issue of *res judicata* or estoppel.

In her submissions, counsel for the petitioner gave the details of the respondents' alleged wrongdoings. The petitioner said that false invoices were issued when in fact there was no real supply of materials. The disputed transactions were done through the Wong family's related companies. The delivery order was false because there was no delivery. The delivery orders showed that they were not sent to the addresses of the companies concerned. The acknowledgement chop had shown that they were not made by the intended recipient of the goods. Instead of disproving the allegation by producing delivery orders and receipts of delivery, the respondents had accused the petitioner of taking the said documents without authority and had leveled allegations on the character of the petitioner.

The petitioner submitted that the financial improprieties as mentioned above are a visible departure from the standards of fair dealing. It is a violation of the condition of fair play which a shareholder is entitled to accept and it amounts to oppressions, *Re Khong Thai Sawmill (Miri) Sdn Bhd v. Ling Beng Sung* [1978] 2 MLJ 227 was referred to.

The second allegation is that the respondents had failed to lodge the fifth respondent's statutory report since 1994. The respondents attributed the delay to the Finance Manager's resignation. However, the resignation was in 1998. According to the petitioner, this could not explain the delay for the four years preceding the resignation. The petitioner deduced that the real reason for the delay was that the accounting procedures and records were never properly maintained and the minutes and figures were not reliable. The petitioner relied on *Chiew Sze Sun & Anor v. Cast Iron Products Sdn Bhd & 4 Ors* [1993] 2 AMR 44 where the court held that the delay in submitting the accounts would be a clear case of mismanagement. Any reason for delay was unacceptable. The respondents had acted in total disregard of the interest of the petitioners.

The third allegation is failure to declare dividends. Respondents said that dividends were not declared because of capitalization of profits towards the increase of the share capital in view of the company's objective to be public listed. Petitioner alleged that no meetings were ever held to decide on the capitalization of profits. Further, the company's objective to be public listed must have been abandoned as it had failed to lodge annual returns since 1994. Petitioner again referred to *Chiew Sze Sun & Anor v. Cast Iron Products Sdn Bhd & 4 Ors* [1993] 2 AMR 44 where it was held that the respondents' failure to declare dividends constituted an oppressive conduct and was a total disregard of the interest of the petitioner.

The fourth allegation is the giving of unauthorized loans. On this, the petitioner said that the respondents had not made any credible denial. The respondents had said that those were repayment to directors for short term advances made to banks. The respondents had not given details on what those advances were, to which bank and for what purpose.

There were also unauthorized loans to directors. The petitioner said that a personal loan of RM750,000 is being repaid from the proceeds of sale of company property. The board had not authorized this. The loan of RM750,000 is set off against the purchase price from the second progressive payment stage onwards. The respondent said that this amount is for directors emolument.

The last ground is the petitioner's removal as director. The petitioner said that the exclusion of the petitioner from the management of the company is oppression. It is in breach of an express or implied understanding to allow him to participate in the management of the company where the director's remuneration is the only source of income.

On the approach that the court should take in this case, the petitioner cited the case of *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd* [1994] 2 MLJ 789 as guidance. At the end of the day, the court must decide the petition on the evidence before it. Since allegations are made in the respondent's affidavits, the respondent must make a credible denial to those allegations in their affidavits.

The petitioner suggested in his submission that in most s. 181 cases, the only practical option is a divorce where the majority buys out the minority. The value of shares would be determined by attributing to them the proportion of the total asset value of the company that they represent. The petitioner submitted that the shares should be valued at the date he was removed as a director, which is 20 April 1999, or 8 November 2000, the date of presentation of the petition. The case of *Re OC (Transport) Services Ltd* [1980] BCLC 251 was referred to.

In reply to the petitioner's allegations, the respondent said that the petitioner was never meant to be a partner nor was he ever thought of as quasi partner of the fifth respondent. His removal was attributed to his own conduct. He was said to have not been able to discharge his function as Technical Director efficiently and his expertise was far short of what was represented to the company. The respondents also said the petitioner had to resign as director of the fifth respondent in January 1994 due to the fact that there was a police report lodged against him for his involvement in illegal 4 digit gambling activities. He was reappointed on 11 September 1995.

On the fracas during the meeting of November 1998, the respondent said that the petitioner lost his temper when he could not accept the reasons given to him for the delay in preparation of the accounts of the fifth respondent. He had in a fit of anger punched and physically injured the first respondent and the second respondent, a lady. He had taken away the documents referred to in the meeting, by force. The respondent alleged that the petitioner had approved at a meeting of the board held in June 1991 where it was resolved that the accounts of the fifth respondent for the year ended 1990 be deferred.

On the allegation of false invoices, the respondents said that the invoices were issued in 1991 and the petitioner had full knowledge. He had never sought to complain until now. All the allegations were centered on events that occur from 1990 to 1992. The petitioner had not complained until now.

The respondent referred to *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 229 where the Privy Council was of the view that, "... for the case to be brought within s. 181(1)(a) at all, the complaint must identify and prove "oppression" or "disregard". The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon the power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule ...".

The respondent cited a number of authorities to show that the petitioner has failed to fulfill the criteria of oppression. A legitimate expectation against the respondents to the petition must be established according to *Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd* [1996] 1 MLJ 687. A contractual relationship between members of a company was emphasized in *In Re Carrington Cotton Corporation Ltd* [2000] Q SC 61. *Re Saul D Harrison & Sons Plc* [1995] 1 BCLC kept the issue of unfairly prejudicial conduct within the confines of the company's Articles of Association.

On allegations of mismanagement, financial proprieties, unauthorized transaction, fraud, etc., the respondents submitted that the petitioner had not produced any credible evidence. The events occurred nine years ago (1991-1993) but the petitioner had only now complained about it. Citing *Narayan v. Official Assignee, Rangoon* (AIR [1941] PC 93), the petitioner said that it is trite law that any allegation of fraud or illegality must be proved beyond reasonable doubt whether made in civil or criminal proceedings and cannot be based on conjecture.

The respondents cited *Jaya Medical Consultants Sdn Bhd v. Island & Peninsular Bhd & Ors* [1994] 1 MLJ 520 to show what should be shown is "unfairness". Mere discrimination against or prejudice to such a member is insufficient to attract the court's jurisdiction to intervene."

It appears that the petitioner and the respondents' relationship had reached a stage where they could no longer see eye to eye, let alone work together. Both sides hurl accusations. The petitioner complained of oppression, whereas the respondents claimed that the petitioner had himself to blame for the state of affairs that he is in. In dealing with the issues, I am guided by the facts at hand and the law.

I look to the case of *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd* [1994] 2 MLJ 789 for guidance. The principles in the case are that at the end of the day the judge must decide the petition on the evidence before it. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondents in affidavits, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition based on undisputed facts.

Looking at the facts as they are, I find that the respondents had not come up with credible denials of the allegations made by the petitioner. On complaints relating to financing irregularities and mismanagement of the petition, I find that the respondent had not done enough to refute the claims. The respondents had not disproved the allegation of false invoicing. Instead of coming up with delivery orders and receipts, they had deemed it fit to turn the tables against the petitioner. Allegations were made that his abilities left much to be desired and that he had once been investigated for dealing in illegal four digit lottery. However, the respondents had not refuted the allegations leveled against them. In the absence of any credible denial, I deduced that the financial improprieties did occur. These financial improprieties are a visible departure from the standards of fair dealing and a violation of the condition of fair play which a shareholder is entitled to accept. It amounts to oppression.

The respondents' failure to lodge the statutory reports further aggravates the situation. The respondents' explanation is that the respondent had attended a Board Meeting back in June 1991 where it was agreed that the fifth defendant's account for the year ended 1990 be deferred. In other words, after all these years, the petitioner had chosen to complain about it now. What is clear no statutory report was lodged since 1994. The 1999 Annual General Meeting had tabled the statement for year 1996 whilst the 1997 and 1998 had still not been prepared. This is clearly mismanagement of the financial affairs of the company.

On the issue of failure to declare dividends, I find that there is no denial from the respondents. What they have said was that the dividends were not declared because of capitalization of profits towards the increase of share capital. This was said to be in view of the company's objective to be public listed. Surely the respondent's failure to lodge its annual returns since 1994 would put the purported objective in serious doubt. In any event, failure to declare dividends is an oppressive conduct and in total disregard of the interest of the petitioner. On this, I agree with the case of *Chiew Sze Sun v. Cast Iron Products* as cited by the petitioner.

The respondents had not given a credible denial on the allegation of unauthorized loans to directors. The respondents merely said that the purported loans were repayment to directors for short term advances made to banks. The respondents had not given any details of what those advances were, to which bank and for what purpose.

On the unauthorized transactions alleged by the petitioner, the respondents' excuse that the RM750,000 is director's emolument is not acceptable. It does not refute the allegation that the above amount is set-off against the purchase price of the company property to pay off the first respondent's personal loan.

Lastly, on the issue of the removal of the petitioner as director, it is clear that the petitioner was allowed to participate in the management of the company. However there is nothing to show that Autron is a quasi partnership or that it had been agreed that the petitioner would be entitled to remain on the board. The petitioner had failed to show that he had such legitimate expectation.

I am satisfied that there are sufficient grounds to show that the affairs of the company were exercised in a manner oppressive to petitioner and in disregard of his interest as a member or shareholder. Winding up would of course be a drastic remedy as the company is an ongoing concern.

The orders to be given by the court under a s. 181 petition must best serve the interest of the member or shareholder *vis a vis* the company as it thinks fit. I believe in the current scenario, where it would not be possible for the parties to work together, the only practical option is where the majority buys out the minority as against the last resort of winding up.

I thereby made the following orders under s. 181 of the Companies Act 1965:

(i) Ernst & Young to be appointed auditor to carry out auditing of the fifth respondent's accounts and investigation on the issue of 'financial impropriety' as stated in the petition.

(ii) Ernst & Young to conduct a valuation of the shares according to the market value from the date of filing of the petition.

(iii) The auditor's costs to be borne by the fifth respondent.

(iv) The first to fourth respondents was required to purchase the petitioner's shares in 120 days from the date of Ernst & Young's confirmation by letter to the first to fifth respondents on the market value of the shares.

(v) The first to second respondents to take whatever action necessary to procure the petitioner's release as guarantor, subject to the bank's approval.

(vi) In the alternative, if the first to fourth respondents fail to pay the price of the shares, the fifth respondent be wound up.

(vii) Parties to bear their own costs.